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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SHEILA K. MONTGOMERY,
Plaintiff-Appellant,

No. 00-2099

v.

THE STATE OF MARYLAND;
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES, Division of Corrections;
ROBERT KUPEC, Warden;
GEORGE KALOROUMAKIS, Assistant Warden,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-00-1019)

Argued: May 8, 2001

Decided: September 26, 2001

Before WILKINSON, Chief Judge, and WILKINS and
LUTTIG, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Luttig joined.

COUNSEL

ARGUED: Jonathan Richard Siegel, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW, Washington, D.C., for Appellant. Alisa Beth Klein, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. Andrew Howard Baida, Solicitor General, Baltimore, Maryland, for Appellees. ON BRIEF: Deborah A. Jeon, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND, Centreville, Maryland; Robin R. Cockey, COCKEY, BRENNAN & MALONEY, Salisbury, Maryland, for Appellant. David W. Ogden, Assistant Attorney General, Lynne A. Battaglia, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. J. Joseph Curran, Jr., Attorney General of Maryland, Scott S. Oakley, Assistant Attorney General, Amanda S. La Forge, Staff Attorney, Baltimore, Maryland, for Appellees.

OPINION

WILKINSON, Chief Judge:

This case requires us to decide whether the district court properly dismissed plaintiff's suit on sovereign immunity grounds. We affirm the dismissal, but for reasons different from the district court.

I.

Plaintiff Sheila Montgomery worked as an administrative aide to the Warden of Maryland's Eastern Correctional Institute (ECI). In September 1999, Montgomery took extended leave under the Family Medical Leave Act (FMLA) to have a scheduled surgical procedure. During her absence, Montgomery was reassigned to a position as a secretary in the maintenance department. It is undisputed that this new assignment kept her at the same pay grade and increment level within the Maryland State Personnel Management System. It is also undisputed that Montgomery suffered no loss of benefits. Montgomery, however, felt that this transfer amounted to a retaliatory demotion in response to her having taken FMLA leave. She filed suit against the State of Maryland, ECI Warden Robert Kupec, and ECI Assistant Warden George Kaloroumakis. Kupec and Kaloroumakis were sued in both their individual and official capacities.

In response to Montgomery's suit, Maryland filed a motion to dismiss. At first, the state argued both that sovereign immunity barred Montgomery's suit and that Montgomery had failed to state a claim because she was returned to an equivalent position. Before Montgomery replied, however, Maryland withdrew the Eleventh Amendment defense on behalf of all defendants.

Notwithstanding Maryland's withdrawal of the argument, the district court, sua sponte, dismissed Montgomery's suit on sovereign immunity grounds. Noting its "duty not to enforce unconstitutional statutes," the court held that the FMLA did not abrogate Maryland's sovereign immunity. The district court also held that the state's withdrawal of the sovereign immunity defense did not amount to giving consent to be sued in federal court. The court dismissed the complaint against all defendants. Montgomery then filed this appeal.

II.

A.

We first ask whether the district court erred in deciding the sovereign immunity question. In Wisconsin Department of Corrections v. Schacht, 524 U.S. 381 (1998), the Supreme Court discussed whether the Eleventh Amendment defense is one that courts must always address, even sua sponte. In that case, the Court considered whether the presence of one claim subject to Eleventh Amendment immunity deprived the district court of removal jurisdiction over the entire suit or whether federal jurisdiction survived with respect to the remaining claims. Id. at 386. Holding that the presence of a claim barred by the Eleventh Amendment does not destroy removal jurisdiction over the entire suit, the Court noted that the Eleventh Amendment "does not automatically destroy original jurisdiction" because the "State can waive the defense." Id. at 389. Accordingly, the Court reasoned that a district court need not "raise the defect on its own" and that "[u]nless the State raises the matter [i.e., the defense of sovereign immunity], a court can ignore it." Id.

The district court failed to recognize the discretion afforded it by Schacht. To the contrary, the court explained its sua sponte consideration of the Eleventh Amendment issue as being required by its "duty not to enforce unconstitutional statutes." The court would have been well advised, however, not to take up the Eleventh Amendment defense. When a state clearly contemplates the defense of sovereign immunity and then affirmatively and unequivocally decides to withdraw that argument, a district court errs in considering the issue sua sponte. This is true regardless of how the court ultimately rules. The Eleventh Amendment reflects the principle that in a federal

system with dual sovereigns, one sovereign must treat the other with a measure of respect. See South Carolina State Ports Authority v. Federal Maritime Commission, 243 F.3d 165, 172 (4th Cir. 2001) ("dual sovereignty posits a relationship of mutual respect "). This goal is undermined when a federal court imposes on a state a legal argument that the state first advanced but then affirmatively withdrew.[1]

B.

In the appeal before this court, the State of Maryland reversed course and decided to aggressively invoke the defense of sovereign immunity. When asked at oral argument, counsel for the state unequivocally stated that Maryland was invoking its sovereign immunity as a defense to Montgomery's suit. This assertion was followed by a letter which confirmed, for the record, that "the State appellees assert that the Eleventh Amendment bars the plaintiff's claim filed under the Family Medical Leave Act." Because Maryland has pursued in this litigation what might be described as an erratic approach to its own Eleventh Amendment defense, we address whether this court has the discretion to consider Maryland's assertion of immunity even though the Attorney General attempted to withdraw it below. We conclude that we do have discretion, and

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[1]We do not, of course, address the propriety of sua sponte consideration of Eleventh Amendment defenses which the state has not raised. See, e.g., Higgins v. Mississippi, 217 F.3d 951, 954 (7th Cir. 2000) (affirming the dismissal of a pro se prisoner suit on Eleventh Amendment grounds, even though the state did not respond, because doing so protected the state from frivolous federal litigation and served the "interest in maintaining harmonious relations between the states and the federal government") (internal quotations omitted). Such a situation does not reflect the same affront to state prerogatives as consideration of a defense which the state has affirmatively and unequivocally withdrawn.

that there is a substantial difference between consideration of an Eleventh Amendment defense in the face of an affirmative withdrawal and consideration of the defense in the face of an emphatic assertion of the immunity.

It is axiomatic "that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." Edelman v. Jordan, 415 U.S. 651, 678 (1974). As the Supreme Court has explained, "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 467 (1945).

Further, circuit precedent allows the Eleventh Amendment to be raised for the first time on appeal, regardless of whether the case was resolved on the pleadings, see Suarez Corp. Indus. v. McGraw, 125 F.3d 222 (4th Cir. 1997), or upon a grant of summary judgment, see In re Creative Goldsmiths, Inc., 119 F.3d 1140 (4th Cir. 1997). Indeed, a rule that prevented an appellate court from considering the defense sua sponte would impair the important sovereign interest that the Eleventh Amendment protects. Thus, the fact that Maryland did not assert the immunity defense below does not preclude the state from asserting it now.

Montgomery contends, however, that Maryland's conduct before the district court amounted to a waiver of the sovereign immunity defense. It is undisputed that the defense of sovereign immunity can be waived. See South Carolina Ports, 243 F.3d at 170. And Montgomery claims that by withdrawing the sovereign immunity argument from its motion to dismiss, Maryland waived the defense.

Under Maryland law, however, the Attorney General may not dispositively waive the defense of sovereign immunity on behalf of the state. In Linkenhoker v. Weinberger, 529 F.2d 51 (4th Cir. 1975), this court held that "[s]ince the Maryland courts and legislature have been so explicit in denying the attorney general the power to consent to suits against the state in its own courts, a fortiori he may not consent to suits against the state in federal court which would otherwise be barred by the eleventh amendment." Id. at 54.

Linkenhoker explicitly relied on Maryland law because in Ford, the Supreme Court held that whether executive officers of a state have validly waived the defense of sovereign immunity is determined by looking at "their power under state law to do so." Ford, 323 U.S. at 467. As Linkenhoker acknowledged, the Maryland courts have already resolved this issue of state law. Indeed, in Brohawn & Bros. v. Board of Trustees, 304 A.2d 819 (Md. 1973), Maryland's highest court unequivocally stated that "neither counsel for the State nor any of its agencies may, either by affirmative action or by failure to plead the defense, waive the defense of governmental immunity." Id. at 820 (internal quotations omitted). Rather, suits against the state of Maryland can proceed only "where specific legislative authority" has been given and where the legislature has allocated funds "for the satisfaction of the judgment." Id. It is undisputed that Maryland's legislature has not authorized FMLA suits against the state nor has it allocated funds to satisfy FMLA judgments.

Montgomery acknowledges our holding in Linkenhoker and the underlying Brohawn decision, but claims that these cases have been superseded by subsequent legislative and judicial pronouncements. However, as the United States recognizes in its amicus brief, we relied upon Linkenhoker just four years ago for the proposition that "the Attorney General of Maryland lacks

the authority to waive Eleventh Amendment immunity on behalf of the state and its officials." Booth v. Maryland, 112 F.3d 139, 145 n.2 (4th Cir. 1997). And in In re Creative Goldsmiths, this court, examining current Maryland law, held that "[u]nder state law, in Maryland's own courts, `a waiver of sovereign or governmental immunity from suit generally requires that two conditions be met.'" 119 F.3d at 1149 (quoting Kee v. State High-way Administration, 545 A.2d 1312, 1317 (1988)). "`First the Legislature must authorize suits for damages and second, there must be provision for the payment of judgments.'" Id. (quoting Kee, 545 A.2d at 1317). As neither condition has been met, under Maryland law an attempt by the Attorney General to waive sovereign immunity in this case cannot be binding on the state.

A failure to address the assertion of immunity would be inappropriate on several fronts. First, there is the important interest of not having private individuals impose a levy on state treasuries without any consent by the state itself. Secondly, there is a risk of judicially enforcing a private right of action which may rest upon an invalid exercise of Congressional authority. Third, Maryland now quite explicitly asserts the Eleventh Amendment defense. Just as it might constitute a disregard of a state's sovereign prerogative to entertain the defense in the face of an unequivocal withdrawal of immunity, so too might we abridge state sovereignty by failing to respect a claim of immunity in the face of the state's unequivocal assertion of it.

III.

Montgomery asserts claims against the State of Maryland, as well as against Warden Robert Kupec and Assistant Warden George Kaloroumakis in both their official and individual

capacities. With one exception, the Eleventh Amendment bars all these claims.

A.

First, Montgomery's claims against the state are barred by the Eleventh Amendment. The Eleventh Amendment bars private suits against unconsenting states unless Congress can validly abrogate a state's Eleventh Amendment immunity. See Alden v. Maine, 527 U.S. 706, 755-57 (1999); South Carolina Ports, 243 F.3d at 176-77. In this case, the suit against the state itself may proceed only if Congress properly enacted the FMLA pursuant to its Fourteenth Amendment, § 5 power. See Lizzi v. Alexander, 255 F.3d 128, 134-36 (4th Cir. 2001). In Lizzi, we specifically noted that the FMLA is not "congruent and proportional to the identified Fourteenth Amendment violation -- employment discrimination on the basis of sex." Id. at 134. Consequently, the FMLA "is not a valid abrogation of a state's Eleventh Amendment immunity from suit." Id. at 135. In arriving at this conclusion, this court became the seventh federal court of appeals to hold that the FMLA does not abrogate the sovereign immunity of the states. See, e.g., Townsel v. Missouri, 233 F.3d 1094, 1095 (8th Cir. 2000); Chittister v. Department of Cmty. & Econ. Dev., 226 F.3d 223, 228 (3d Cir. 2000); Kazmier v. Widmann, 225 F.3d 519, 526 (5th Cir. 2000); Sims v. University of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000); Garrett v. University of Ala., 193 F.3d 1214, 1219 (11th Cir. 1999), rev'd on other grounds sub nom. Board of Trustees v. Garrett, 121 S. Ct. 955, 961, 968 (2000). Because the FMLA does not validly abrogate Maryland's Eleventh Amendment immunity, the claims against the state must be dismissed.

Second, the Eleventh Amendment bars Montgomery's claims

against Kupec and Kaloroumakis for retroactive relief in their official capacities. "The Eleventh Amendment bars a suit against state officials when `the state is the real, substantial party in interest.'" Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101 (1984) (quoting Ford, 323 U.S. at 464). Whether the claim be legal or equitable in nature, a private plaintiff cannot receive retrospective relief from state officers sued in their official capacities. See Edelman v. Jordan, 415 U.S. at 666-69; Lizzi, 255 F.3d at 136. Thus the Eleventh Amendment bars suits by private plaintiffs for backpay and other forms of retroactive relief that are in reality claims against the state itself. See Pennhurst, 465 U.S. at 101, n.11; Edelman, 415 U.S. at 666-69. These types of actions can only be official capacity suits. Consequently, Montgomery's claims against the individual supervisors in their official capacities for retroactive relief must be dismissed.

Third, Montgomery's claims against Kupec and Kaloroumakis in their individual capacities must be dismissed as well. Normally, of course, the Eleventh Amendment does not bar claims by private plaintiffs against individual officers in their individual capacities. See Hafer v. Melo, 502 U.S. 21, 28-29 (1991). But this court has recently held in Lizzi that the state is the real party in interest when an official is sued for damages for official acts under the FMLA. Lizzi, 255 F.3d at 136-38. We based this conclusion in large part on the fact that private plaintiffs "would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer." Id. at 137. A rule permitting this would undermine recent Supreme Court decisions such as Board of Trustees of the University of Alabama v. Garrett, 121 S. Ct. 955 (2001), Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), and Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). Lizzi, 255 F.3d at 137-38.

Indeed, the Seventh Circuit is in accord with our holding in Lizzi that if a statute treats an individual state employee as the employer, the real party in interest is in reality the state itself. See Luder v. Endicott, 253 F.3d 1020, 1022-23 (7th Cir. 2001) ("[A] suit nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state is, we think, barred. Any other position would be completely unrealistic and would make a mockery of the Supreme Court's heightened sensitivity to state prerogatives."). In this case, Montgomery's FMLA claims against the supervisors in their individual capacities make clear "that the state is the real party in interest." Lizzi, 255 F.3d at 136. Thus, the state's Eleventh Amendment immunity transfers to these individual capacity claims as well.

Moreover, even if Montgomery's claim for damages could somehow survive the sovereign immunity defense, dismissal would still be proper because she has failed to state a claim upon which relief can be granted. The damages provision of the FMLA limits recovery to "any wages, salary, employment benefits, or other compensation denied or lost" on account of the violation. 29 U.S.C. § 2617(a)(1)(A)(i)(I). In the event that no wages, salary, or other compensation are lost, damages are limited to "any actual monetary losses sustained by the employee . . . such as the cost of providing care." Id. § 2617(a)(1)(A)(i)(II).

Montgomery has not alleged that she suffered actual monetary damages, either in lost wages or in the cost of providing care. Rather, her demand for monetary relief appears to be rooted solely in her claim for emotional damages. The FMLA text nowhere provides, however, for recovery of damages for emotional distress. See Settle v. S.W. Rodgers, Co., 998 F. Supp. 657, 665-66 (E.D. Va. 1998), aff'd 182 F.3d 909 (4th Cir.

1999). Thus, Montgomery's suit for damages against Kupec and Kaloroumakis was properly dismissed even absent the Eleventh Amendment bar.

B.

The only remaining claim against the individual supervisors in their official capacities is Montgomery's claim for reinstatement to her former position. This claim can proceed because Montgomery's complaint alleges an ongoing violation of federal law. See Ex parte Young, 209 U.S. 123 (1908); Edelman, 415 U.S. at 664; South Carolina Ports, 243 F.3d at 170. The FMLA requires employers to restore an employee returning from FMLA leave to either the same position or "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)(A)-(B). The regulation defining an equivalent position focuses on the factors of equivalent pay, equivalent benefits, and equivalent terms and conditions of employment. 29 C.F.R. § 825.215 (2000). Equivalent terms and conditions of employment, however, do not require equivalence with respect to "the de minimis or intangible, unmeasurable aspects of the job." Id. at §§§ 825.215(f).

Montgomery's complaint focuses on precisely the sorts of de minimis, intangible, and unmeasurable aspects of a job that the regulations specifically exclude. For example, she contends that her duties formerly were "truly administrative," but now are "the simplest, most menial of clerical functions: answering the phone, taking messages, typing simple correspondence, and the like." Moreover, she claims that while she used to have "her own work area," now she must work in a "room shared with another employee." Finally, she contends that she has diminished job security.

Montgomery concedes, however, that her pay grade and increment level remained the same. The record reflects that both before and after her leave, Montgomery was classified as an "Administrative Aide Stenographer" by the Maryland State Personnel Management System. She also received a four percent raise within two months of being transferred. And since Montgomery's transfer did not require a change in classification, she has not lost any job security. Cf. Hampton v. Univ. of Md., 674 A.2d 145, 150 (Md. App. 1996). As the Executive Director of the Human Resources Services Division of the Department of Public Safety and Correctional Services explained:

> Ms. Montgomery is no more, and no less, subject to adverse action by the Maryland State Personnel Management System now, as assigned to the Maintenance Department at ECI, than she was when she was formerly assigned to the Warden's office at ECI. Her employment rights within the [system] . . . have not changed with her reassignment from the Warden's office to the Maintenance Department.

Montgomery's other complaints, such as the alleged reduction in the complexity of her tasks and the sharing of work space, also fall within the excluded de minimis category. The difference between "truly administrative" tasks and "answering the phone, taking messages, typing simple correspondence, and the like" is not of sufficient magnitude, especially given the equivalent pay grade, increment level, and administrative classification, to constitute an FMLA violation. And the difference between having one's own work space and having to share space with one other person is not of such import as to implicate the protections of the governing federal law. In sum,

Montgomery's claim for reinstatement was properly dismissed.[2]

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[2]Montgomery is likewise not entitled to injunctive relief because her complaint demonstrates that her change in status was not related to her assertion of her rights under the Family and Medical Leave Act. According to her own summary of her complaint, the Defendants transferred her "to retaliate against her for filing a grievance and otherwise complaining of her work conditions." As it is evident that Montgomery would have been transferred even if she had not taken medical leave, she has no right to be returned to her pre-leave position. See 29 C.F.R. §§ 825.216(a), 825.312(d) (2000)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHEILA K. MONTGOMERY

v. CIVIL NO. S 00-1019

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
WARDEN ROBERT KUPEC
DEPUTY WARDEN GEORGE
KALOROUMAKIS

MEMORANDUM OPINION

Upon review of the defendants' motion to dismiss, and the plaintiff's opposition thereto, the motion will be granted, for the reasons that follow. No further briefing or oral hearing is needed. Local Rule 105.6, D. Md.

Although the defendants have withdrawn that portion of their motion to dismiss arguing that the Family and Medical Leave Act (FMLA) cannot be applied to the states under the Eleventh Amendment, the Court has a duty not to enforce unconstitutional statutes. The FMLA, as applied to the states, is clearly unconstitutional under the Eleventh Amendment, because it allows the states to be sued in a federal court without their consent, in the absence of a constitutionally-adequate abrogation of that immunity by Congress. Very recent case law persuasively states the reasoning supporting this conclusion, which the Court need not repeat here. *See, e.g, Sims v. University of Cincinnati*, ___ F. 3d ___, 2000 WL 973501 (6th

Cir. Jul. 17, 2000). Certainly, the defendants' withdrawal of part of their motion to dismiss does not amount to a constitutionally significant consent to suit or other waiver of sovereign immunity by the State of Maryland under the Eleventh Amendment. Therefore, this Court has no subject matter jurisdiction over the FMLA count -- Count II -- of the plaintiff's complaint.

Count I of the plaintiff's complaint claims a violation of the Due Process Clause. It asserts jurisdiction under 42 U.S.C. § 1983. To the extent that the plaintiff names the State of Maryland or its agencies as a defendant on that count, she fails to state a claim. To the extent that she presses her claim individually against defendants Kupec and Kaloroumakis, the complaint fails to state a claim under Fed. R. Civ. P. 12 (b) (6), and may be dismissed accordingly. The reason it fails to state a claim is that there is no protected liberty interest in retention of precisely the same terms and conditions of employment following return medical leave as before, nor is there *per se* any protected liberty interest in being free of "retaliation," in the absence of a public employee's exercise of a specific constitutional right, which medical leave is not. The plaintiff's job title, pay grade, and increment level stayed the same in her new job as a secretary in the maintenance department as when she was a secretary in the warden's office. Only did her duties change.

Even under Title VII, mere changes in working conditions or perceptions about a job's duties or status -- whether plaintiff's perceptions or anyone else's -- are not considered adverse employment actions that can form the basis for suit. *See Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981), *cert. denied*, 454 U.S. 892 (1982). It follows, therefore, that there should be no protected liberty interest in such conditions of employment, so long as the job employee's right to continue at the same level of pay and benefits is preserved, as here.

Even if there were a protected liberty interest, there is no showing that the defendants had a federal constitutional duty to provide the plaintiff with notice or hearing before assignment to the new job. Thus, there is no sufficient showing of any violation of a constitutional right to support an action under Section 1983, and Count I will be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12 (b) (6).

Because the State of Maryland apparently remains amenable to suit in state court under the FMLA, *see Sims, supra,* slip op. at 15, Count II will be dismissed for lack of federal subject matter jurisdiction, without prejudice whereas Count I will be dismissed for failure to state a claim under Fed. R. Civ. P. 12 (b) (6), all by a separate Order to be entered herein.

/s/ Frederic N. Smalkin
United States District Judge

Dated: /s/ July 25, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHEILA K. MONTGOMERY

v. CIVIL NO. S 00-1019

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
WARDEN ROBERT KUPEC
DEPUTY WARDEN GEORGE
KALOROUMAKIS

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is, this 25th day of July, 2000, by the Court, ORDERED:

1. That defendants' motion to dismiss Count I, BE, and it hereby IS, GRANTED, for failure to state a claim under Fed. R. Civ. P. 12 (b) (6);

2. That defendants' motion to dismiss Count II, BE, and it hereby IS, GRANTED, without prejudice, for lack of federal subject matter jurisdiction;

3. That this case BE, and it hereby IS, CLOSED; and

4. That the Clerk of Court mail copies hereof to counsel for the parties.

/s/ Frederic N. Smalkin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 23, 2001

No. 00-2099
CA-00-1019

SHEILA K. MONTGOMERY
Plaintiff - Appellant

v.

THE STATE OF MARYLAND; DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; Division of Corrections; ROBERT KUPEC, Warden; GEORGE KALOROUMAKIS, Assistant Warden
Defendants - Appellees

UNITED STATES OF AMERICA
Amicus Curiae

ORDER

Appellant has filed a petition for rehearing.
The Court denies the petition for rehearing.

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX D

U.S. Const.: Amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement. The entitlement to leave

under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

§ 2614. Employment and benefits protection

(a) Restoration to position.

(1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 [29 USCS § 2612] for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 102 [29 USCS § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 USCS §

2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 [29 USCS § 2612] to report periodically to the employer on the status and intention of the employee to return to work.

§ 2615. Prohibited acts

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS §§ 2611 et seq.].

§ 2617. Enforcement

(a) Civil action by employees.

(1) Liability. Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 [29 USCS § 2615] proves to the satisfaction of the court that the act or omission which violated section 105 [29 USCS § 2615] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105 [29 USCS § 2615], such court may, in the discretion of the court, reduce the amount of the

liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations. The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an

eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

Department of Labor regulations,
29 C.F.R. § 825 et seq.

29 C.F.R. § 825.215

What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent Pay.

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on "leave without pay." In such case, any pay increase would be

granted based on the employee's seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. See § 825.220 (b) and (c). A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). See paragraph (d)(2) of this section.

(d) Equivalent Benefits. "Benefits" include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability

insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal

leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have

sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) Equivalent Terms and Conditions of Employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the

employer to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis or intangible, unmeasurable aspects of the job. However, restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

29 C.F.R. § 825.216

Are there any limitations on an employer's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See § 825.107.

(c) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees ("key employees," as defined in paragraph (c) of § 825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in § 825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

APPENDIX E

[Letterhead - Offices of the Attorney General, Maryland Division of Correction]

July 11, 2000

Hon. Frederick N. Smalkin, Judge
U.S. District Court
Garmatz Federal Courthouse, Room 310
101 W. Lombard Street
Baltimore, Maryland 21201

Re: *Montgomery v. State of Maryland, et al.*, Civil No. S-00-CV-1019

Dear Judge Smalkin:

Pending before the Court in the above-referenced FMLA case is a motion to dismiss filed by this office on behalf of all Defendants. Plaintiff's response has not yet been filed.

The purpose of this letter is to withdraw, on behalf of all Defendants, the 11th Amendment immunity defense to Count II of the Complaint argued at pages 14-17 of Defendants' Memorandum in Support of Motion to Dismiss.

Thank you for your consideration in this matter.

Very truly yours,

/s/ Scott S. Oakley
Assistant Attorney General

SSO/dbm
cc: Robin R. Cockey, Esq.

APPENDIX F

[Letterhead - Office of the Attorney General]

May 9, 2001

FEDERAL EXPRESS

Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219

Re: *Montgomery v. State of Maryland, et al.*, No. 00-2099

Dear Ms. Connor:

I am writing to confirm the position I expressed during the oral argument of the above case and, I believe, in our brief, namely, that the State appellees assert that the Eleventh Amendment bars the plaintiff's claim filed under the Family and Medical Leave Act. I am enclosing copies of this letter that I respectfully request be circulated to Chief Judge Wilkinson and Judges Wilkins and Luttig, who comprise the panel assigned to the case.

Thank you for your consideration.

Sincerely,

/s/ ANDREW H. BAIDA
Solicitor General

cc: Jonathan R. Siegel, Esq.
Robin R. Cockey, Esq.
Deborah A. Jeon, Esq.
Alisa B. Klein, Esq.